Supreme Court, U.S.
FILED
SEP 12 1997
CLERK

No. 97-336

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES EX REL. PAMELA A. BERGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Intervenor-Respondent,

and

UNIVERSITY OF ALABAMA AT BIRMINGHAM, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED

1. Whether this Court should review the determination of the Fourth Circuit that materiality of an allegedly false statement in this civil action was a question for the court rather than the jury where that determination does not conflict with the decision of any other court of appeals and the court below found that, in any event, no reasonable jury could find the statements at issue to be material or false.

2. Whether this Court should review the determination of the Fourth Circuit—applying settled standards of review—that there was insufficient evidence for a reasonable jury to find that the statements at issue were either false or material.

3. Whether this Court should review the determination of the Fourth Circuit that petitioner's claim for conversion under Alabama law was preempted by the Copyright Act where the court below held on the particular facts of this case that her conversion claims were "tantamount to a claim of copyright infringement."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
COUNTERSTATEMENT	3
A. Background	3
B. Berge's Research	4
C. Fowler's Research	5
D. Berge's False Claims Act Suit	7
REASONS FOR DENYING THE WRIT	10
I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S CLAIMS DID NOT REST ON ITS DETERMINATION THAT MATERIALITY IS AN ISSUE FOR THE COURT, AND THAT DETERMINATION IS IN ANY EVENT NOT WORTHY OF REVIEW	10
II. THERE ARE NO COMPELLING REASONS TO REVIEW THE COURT OF APPEALS' ASSESSMENT OF THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE	16
III. THE COURT OF APPEALS APPLIED SETTLED LAW TO THE FACTS OF THIS CASE IN DETERMINING THAT PETITIONER'S STATE-LAW CONVERSION COUNT WAS PREEMPTED	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Amarel v. *Connell*, 102 F.3d 1494 (9th Cir. 1997).. 20
American & Foreign Ins. Co. v. *Bolt*, 106 F.3d 155 (6th Cir. 1997) 20
Anderson v. *Nidorf*, 26 F.3d 100 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995) 28, 29
Aparicio v. *Norfolk & W. Ry.*, 84 F.3d 803 (6th Cir. 1996) 22, 23
Bateman v. *Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996) 28
Benedi v. *McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995) 18
Bierle v. *Liberty Mut. Ins. Co.*, 992 F.2d 873 (8th Cir. 1993) 21
Black v. *Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3109 (U.S. July 24, 1997) (No. 97-159) 21
Bogosian v. *Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472 (1st Cir. 1997) 19-20
Butler v. *Dowd*, 979 F.2d 661 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993) 23
Caudill v. *Farmland Indus., Inc.*, 919 F.2d 83 (8th Cir. 1990) 23, 25, 26
Central Office Tel., Inc. v. *AT&T*, 108 F.3d 981 (9th Cir. 1997) 25
Colvin v. *Housing Auth. of City of Sarasota, Florida*, 71 F.3d 864 (11th Cir. 1996) 20
Cook v. *American S.S. Co.*, 53 F.3d 733 (6th Cir. 1995) 20-21
Curtis v. *Electronics & Space Corp.*, 113 F.3d 1498 (8th Cir. 1997) 20
Daboub v. *Gibbons*, 42 F.3d 285 (5th Cir. 1995) 28, 29
Dace v. *ACF Indus, Inc.*, 722 F.2d 374 (8th Cir. 1983), *as supplemented on rehearing*, 728 F.2d 976 (8th Cir. 1984) 23, 25
Data Gen. Corp. v. *Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994) 28
Delta Airlines, Inc. v. *August*, 450 U.S. 346 (1981) 18

TABLE OF AUTHORITIES—Continued

Page

Doan v. *Seagate Technology, Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997) 20

Dragon v. *Rhode Island Dep't of Mental Health, Retardation & Hosps.*, 936 F.2d 321 (1st Cir. 1991) 24

Duke v. *Uniroyal, Inc.*, 928 F.2d 1413 (4th Cir.), *cert. denied*, 502 U.S. 963 (1991) 17

Ealy v. *Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir.), *cert. denied*, 498 U.S. 950 (1990) 19

Eastman Kodak Co. v. *Goodyear Tire & Rubber Co.*, 114 F.3d 1547 (Fed. Cir. 1997) 20

Emmel v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627 (7th Cir. 1996) 20

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 18

G.S. Rasmussen & Assocs. v. *Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992), *cert. denied*, 508 U.S. 959 (1993) 28, 29

Harolds Stores, Inc. v. *Dillard Dept. Stores, Inc.*, 82 F.3d 1533 (10th Cir.), *cert. denied*, 117 S. Ct. 297 (1996) 27-28

Harper & Row Publishers, Inc. v. *Nation Enters.*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) 29

Harris v. *Chapman*, 97 F.3d 499 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997) 25

Hervey v. *Estes*, 65 F.3d 784 (9th Cir. 1995) 14

Hill v. *Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983) .. 21

K & T Enters., Inc. v. *Zurich Ins. Co.*, 97 F.3d 171 (6th Cir. 1996) 21

Katz v. *City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) .. 24

Kientzy v. *McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993) 23

Kregos v. *Associated Press*, 3 F.3d 656 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994) 28

Kungys v. *United States*, 485 U.S. 759 (1988) 10, 12, 14

Kyles v. *Whitley*, 514 U.S. 419 (1995) 16

Lester v. *RTC*, 994 F.2d 1247 (7th Cir. 1993) 25

TABLE OF AUTHORITIES—Continued

Page

Mattern v. *Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3108 (U.S. July 21, 1997) (No. 97-126) 25
McAnally v. *Gildersleeve*, 16 F.3d 1493 (8th Cir. 1994) 23
McDaniels v. *Flick*, 59 F.3d 446 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1017 (1996) 24
Melton v. *Teachers Ins. & Annuity Ass'n*, 114 F.3d 557 (5th Cir. 1997) 20
National Basketball Ass'n v. *Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) 27
National Car Rental Sys., Inc. v. *Computer Assocs. Int'l, Inc.*, 991 F.2d 426 (8th Cir.), *cert. denied*, 510 U.S. 861 (1993) 28
O'Brien v. *City of Grand Rapids*, 23 F.3d 990 (6th Cir. 1994) 21
Oddo v. *Ries*, 743 F.2d 630 (9th Cir. 1984) 29
Penney v. *Praxair, Inc.*, 116 F.3d 330 (8th Cir. 1997) 20
Redman v. *John D. Brush & Co.*, 111 F.3d 1174 (4th Cir. 1997) 20
Rosciszewski v. *Arete Assocs., Inc.*, 1 F.3d 225 (4th Cir. 1993) 27, 28
Schwimmer v. *Sony Corp.*, 459 U.S. 1007 (1982) 24
Sherbert v. *Alcan Alum. Corp.*, 66 F.3d 965 (8th Cir. 1995) 21
Simms v. *Village of Albion*, 115 F.3d 1098 (2d Cir. 1997) 20
Sinclair v. *United States*, 279 U.S. 263 (1929) 12
Smelser v. *Norfolk S. Ry.*, 105 F.3d 299 (6th Cir. 1997), *pet. for cert. filed*, 65 U.S.L.W. 3827 (U.S. June 4, 1997) (No. 96-1949) 22, 23
Smith v. *World Ins. Co.*, 38 F.3d 1456 (8th Cir. 1994) 21
Sommerville v. *United States*, 376 U.S. 909 (1964) 12
Sumner v. *Mata*, 449 U.S. 539 (1981) 16
Taquino v. *Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990) 29
TSC Industries, Inc. v. *Northway, Inc.*, 426 U.S. 438 (1976) 15

TABLE OF AUTHORITIES—Continued

	Page
Tyger Constr. Co. v. *United States*, 28 Fed. Cl. 35 (1993)	10
United States ex rel. Butler v. *Hughes Helicopter Co.*, No. CV-89-5760-SVW, 1993 WL 841192 (C.D. Cal. Aug. 25, 1993), *aff'd on other grounds*, 71 F.3d 321 (9th Cir. 1995)	14
United States Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166 (1980)	24
United States v. *Abadi*, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)	14
United States v. *Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992)	10
United States v. *Gaudin*, 515 U.S. 506 (1995)	10, 11, 12, 13, 15
United States v. *Johnston*, 268 U.S. 220 (1925)	16
United States v. *Norris*, 749 F.2d 1116 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985)	15
United States v. *Stelmokas*, 100 F.3d 302 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1847 (1997)	13-14
Villaneuva v. *Brown*, 103 F.3d 1128 (3d Cir. 1997)	20
Walter v. *Holiday Inns, Inc.*, 985 F.2d 1232 (3d Cir. 1993)	24, 25
Wisniewski v. *United States*, 353 U.S. 901 (1957)	24

STATUTES:

17 U.S.C. § 301(a)	27, 28
31 U.S.C. § 3730(c)(3)	9

RULES AND REGULATIONS:

Sup. Ct. R. 10	16, 28
Sup. Ct. R. 14.5	3
Sup. Ct. R. 34.1(g)	2
Fed. R. Civ. P. 50(a)	22
45 C.F.R. § 74.51(d)(1) (1995)	7

OTHER AUTHORITIES:

III Paul Goldstein, *Copyright* (2d ed. 1996)	28
John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541 (1958)	23-24

TABLE OF AUTHORITIES—Continued

Page

1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (1997) 28, 30

Robert L. Stern, *et al.*, *Supreme Court Practice* (7th ed. 1993) 2, 12, 23

9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1995) 25, 26

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BRIEF IN OPPOSITION

Respondents the Board of Trustees of the University of Alabama at Birmingham, Robert F. Pass, Sergio B. Stagno, Charles A. Alford, and Karen B. Fowler respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit in this case.

JURISDICTION

Petitioner correctly notes that she received an extension of time within which to file a petition for writ of certiorari until July 23, 1997. Pet. 2. While petitioner filed by that date a document so styled, that document did not conform to the Rules of this Court. In particular,

this Court's Rule 34.1(g) requires that "each document" must indicate "the name of an attorney who is counsel of record for the party concerned (*who must be a member of the Bar of this Court*)," except in circumstances not present here. Sup. Ct. R. 34.1(g) (emphasis added). The petition filed on July 23, 1997—the jurisdictional deadline—identified as counsel of record an attorney who was *not* a member of this Court's Bar, and therefore did not conform to the requirements of the Rules.

We are aware that commentators have described a practice whereby such deficient pleadings are accepted for filing pending bar admission. *See* Robert L. Stern, *et al., Supreme Court Practice* 313, 734 (7th ed. 1993).[1] These commentators also report that "the date of original submission * * * will be considered as the date of docketing for purposes of satisfying filing deadlines." *Id.* at 734 n.6.[2] We are unaware, however, of any authority in this Court's rules for permitting the filing of a petition deficient in this regard to satisfy jurisdictional filing deadlines. Instead, as noted above, this Court's Rules expressly provide that a pleading must be filed by counsel of record who is a Member of the Bar. The petition filed in this case simply did not conform to the requirements of this Court's Rules.

Nor can it be said that counsel of record's failure to become a member of the Bar of this Court in a timely

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[1] A variation of that practice appears to have been followed in this case. While the petition was filed on July 23, 1997, the case was not docketed upon filing, apparently because counsel of record was not a Member of the Bar. The case was eventually docketed on August 22, 1997—30 days after the petition was filed—although counsel of record still had not been admitted to the Bar at that time.

[2] These commentators note, however, that "there is no excuse for an attorney waiting until the last minute to apply for membership in the Supreme Court Bar." *Supreme Court Practice* at 313. *See also id.* at 734 ("this practice is discouraged and counsel are well advised to apply for membership in the Bar before filing any document").

fashion is simply a matter of "form" that can be corrected by the procedure indicated in Rule 14.5. While respondents have no reason to question the qualifications of petitioner's counsel of record, who has in fact now been admitted to the Bar of this Court, we daresay that membership in the Supreme Court Bar is an obligation that cannot be ignored and a privilege that cannot be assumed. In any event, so far as respondents are aware, the procedure for correction of deficiencies in "form" was not invoked in this case.

At the earliest, then, a petition conforming to the Rules of this Court was not on file before counsel of record's admission to the Bar of this Court on August 29, 1997. Because the petition filed on the jurisdictional deadline did not comply with Rules of this Court going to more than mere matters of "form," the petition is jurisdictionally out of time.

COUNTERSTATEMENT

A. Background. This False Claims Act lawsuit, with a pendent state claim for conversion of "ideas and information," was brought by petitioner after two and a half years of alleging plagiarism before governmental, scientific and academic institutions brought no results satisfactory to her. J.A. 1495; 338-342; 713; 428-429. At various times the lawsuit contained claims for breach of contract, theft of intellectual property, fraud, tortious interference with contractual relations, outrage and civil RICO. J.A. 84-87; 118-122. The gravamen of the claims, however, was always that Berge's academic work had been "scooped" by respondent Fowler, another graduate student at respondent University of Alabama at Birmingham ("UAB"), who allegedly used Berge's ideas and information in a thesis and subsequent publication. J.A. 415.

The inventive transformation of the purported damage to Berge's academic career into a claim on behalf of the

United States resulted in a $1.75 million False Claims Act award only because the district court erroneously failed to find the alleged false statements immaterial and let stand a verdict that could not have been returned by a reasonable jury. Another error of law by the district court permitted the jury to consider a state conversion claim that the Fourth Circuit ultimately found "clearly preempted by federal copyright law." Pet. App. 18a.

B. Berge's Research. Berge was a graduate student in nutrition at Cornell when she visited UAB in 1987. J.A. 235, 250. She was attracted by UAB's preeminent research in cytomegalovirus ("CMV") in mothers and newborns. J.A. 780-781. CMV is the most common cause of infectious birth defects in the country. UAB had collected a mass of data on maternal and congenital CMV unequaled in the world. J.A. 782. Most of this work has been funded by the National Institutes of Health ("NIH") over the last 20 years. J.A. 1510-11.

Berge had "minimal experience" in data analysis and no training in data management. Tr. 681-685; Def. Ex. 39. Her experience in epidemiology had been primarily clerical (data collection, computer entry) or as a laboratory technician (testing tissue samples). J.A. 236-237. The research she proposed to conduct at UAB (on the effect of CMV on birth weight) had been designed by her mentor for a grant application. J.A. 1234. The list of data she planned to abstract came from a publication of the National Academy of Sciences. J.A. 1236-37.

At UAB, Berge's research received generous support. J.A. 719-720, 723-724. By petitioner's own admission, respondent Stagno and others at UAB made important intellectual contributions to her work. J.A. 375-378, 383-384, 1401-02. Berge was given access to computerized data bases containing records of about 20,000 mothers (with 40 variables) and 124 congenitally infected infants. J.A. 719-722. In addition, she had access to computerized developmental data on the infected in-

fants, *id.*, and to the Obstetrical Automated Record System ("OBAR"). J.A. 578-579.

When Berge returned to Cornell after six months at UAB, she received computer tapes containing 11 data sets prepared by UAB staff, but her Ph.D. work went poorly. She was chastised by her department chair for spending excessive time and resources, and warned about her disruptive and abusive behavior. J.A. 1443-44. She complained that the Cornell faculty were untrustworthy (J.A. 379, 1448), and she fired her main thesis advisor. J.A. 374. Although she published (with UAB co-authors) an article on low birth weight derived from her thesis (J.A. 1272), a second article (on risk factors) was rejected by journal editors five times. Tr. 470, 491-492, 524-527, 531-538. Three rejections, highly critical of Berge's research design and data analysis, predated the August 1991 publication of an article by respondents Fowler and Pass, based on Fowler's thesis, in the *Journal of Infectious Diseases*. J.A. 385, 1485-89, 1383.

By the summer of 1989, Berge was unemployed. She had asked UAB for a job so she could finish her thesis there, but she was not hired. Tr. 445; J.A. 705. She became a "research assistant professor" in the Department of Pediatrics at New York University but was terminated from that position in 1992. J.A. 298, 344.

C. Fowler's Research. Meanwhile, Karen Fowler, a doctoral student in UAB's Department of Epidemiology, decided in June 1988 to research the effects of sexually transmitted diseases ("STDs") on maternal CMV infection and transmission. J.A. 626-629. It was a study that respondent Pass—a principal investigator on the CMV grant—had designed before Berge ever arrived at UAB. J.A. 710-711, 1225, 1232-33. Contrary to petitioner's Statement (Pet. 4, 9), this choice was not dictated by Pass, but rather was one of two topics proposed by him—the other was occupational exposure of hospital workers to CMV. J.A. 627-628. In any event, whereas Berge

was studying CMV as a possible *cause of low birth weight,* Fowler was looking at CMV as a *result of STDs.* Berge admitted that Drs. Pass, Alford, and Stagno (among many others) had written about risk factors for transmission of CMV before she did, and that she had not referenced all of them in her written work. J.A. 407-410.

Contrary to Berge's assertion (Pet. 5-6), the two students studied different mother-infant pairs. Fowler drew both her cases and uninfected control subjects from babies who were born between 1980 and 1988. J.A. 632. She selected matched controls (*i.e.,* for each CMV baby, she found one of the same sex and race who was born within six days of the CMV baby but who did not have CMV). J.A. 650-653. By contrast, Berge did not use matched controls and, in fact, failed to confirm whether her controls had CMV. J.A. 395, 431, 568, 789. Moreover, her controls were drawn from births that occurred during a five month period in 1984-85. Tr. 577-578. Finally, Berge extracted most of her data from a computerized data base derived in turn from patient records, whereas Fowler drew hers directly from original medical and laboratory records. J.A. 642, 653, 683, 693, 702. Neither Fowler nor anyone else at UAB ever saw or used the 11 tapes of computerized data extracted by Berge. J.A. 726.

Two tables summarizing medical history and obstetrical data were organized similarly by Berge and Fowler because they had a common source: UAB hospital and clinic forms. J.A. 423-427, 562-565. Moreover, Berge and Fowler examined many of the same variables because they were commonly used in perinatal studies, and the "case control" method and statistical analyses used by both are among the most commonly used research designs in epidemiology. J.A. 611-615, 718.

Although Berge claims that Fowler's research design was based on hers (Pet. 5), the established chronology demonstrates the impossibility of such reliance. Fowler developed her research plan in 1988 and submitted it to

her Ph.D. committee in January 1989. J.A. 639, 1449-84. She had completed her data collection and initial analyses by summer 1989, when she briefly reviewed Berge's dissertation, among others. Berge's dissertation was of no interest to Fowler because it was on a different topic, was by a nutritionist, used an unreliable database, and was organized in a nontraditional format. Fowler took no notes on, or copies of, Berge's dissertation and did not use it in her work. J.A. 670-671, 632-685.[3]

D. Berge's False Claims Act Suit. Berge's faltering academic career and her quest for redress of perceived injustices ultimately led her to seize upon the fact of NIH funding of UAB's research as the basis for redress. Because the data Berge abstracted and the computer services provided by UAB were funded by NIH, and because NIH-supported scientists were co-authors on her paper, UAB included descriptions of her project in annual progress reports to NIH.[4] J.A. 514-516, 1509-13. Berge ultimately settled on charging UAB with submitting four "false claims" in those reports to NIH. None of the statements on which Berge focused, however, were either false or material to any NIH funding decision.

The first statement on which Berge relied was a statement that a "vast amount" of data had been transferred to "unified computerization." As described above, however, there was a firm foundation for this statement given the status of UAB's data collection and organization. In any event, this statement was at most a matter of opinion

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[3] Contrary to petitioner's assertion (Pet. 5, 7), nothing in an internal UAB inquiry report addresses whether Fowler ever saw Berge's *dissertation*. J.A. 1244-46. Rather, that report states that Fowler never saw the *OBAR records* used by Berge or the *computer tapes* containing Berge's derived data sets. J.A. 1245.

[4] According to testimony by an NIH official at trial, the purpose of progress reports is to describe briefly how grant monies were spent the previous year and not to report on the identity of particular graduate students who may have been involved in generating the data. J.A. 596-599. *See also* 45 C.F.R. § 74.51(d)(1) (1995).

that was not in any meaningful sense "false." It was also immaterial to NIH's funding decision, because—as the NIH program officer testified—the basic purpose of the grant was collecting data, not its computerization. J.A. 594-595, 600-601, 1513.

Berge complained as her second alleged false claim that she was not identified by name when the collaborative work was first mentioned in a progress report to the NIH. The failure to include Berge's name did not make the progress report false. As the Fourth Circuit noted, "[t]he report, in fact, did not attribute the abstract to any of its authors; it simply 'abstracted' the study for the purpose of reporting on project activity." Pet. App. 14a. In any event, the responsible NIH official testified that the names of graduate students involved were of no interest to NIH, which simply wanted to know how grant funds were spent. J.A. 596-601. Thus, this purported false claim was neither material nor false.

A third alleged false claim—which the Fourth Circuit called "inexplicable" (Pet. App. 14a)—was that when Berge's work was reported to NIH, and fully attributed to her, the implications for UAB's CMV studies were not fully explained to NIH. But the reporting was through Berge's own abstract presented verbatim in her own words (J.A. 285-287), and she did not mention any "implications" of her work that she later claimed should have been spelled out for NIH. Whether or not she later came to believe that certain implications followed from her work, "[a]n *ex post facto* realization of the possible importance of this implication cannot support a charge of falsity at the time the report was submitted." Pet. App. 15a. UAB's report of Berge's work was truthful.

Berge's fourth alleged false claim was that UAB misled NIH by reporting an abstract of Fowler's allegedly "plagiarized" work. As detailed above, however, this claim finds no support in the record. *See* Pet. App. 15a ("the evidence is patently clear that there was no plagiarism by Fowler and thus no false statement by UAB").

After Berge filed her complaint, an investigation by the HHS Inspector General concluded there was no basis for a criminal proceeding and that "many of the assumptions behind [Berge's] allegations [are] in error or exaggerations of the truth." J.A. 179. The civil remedies division of the Inspector General's office also declined interest in civil litigation and recommended "that no government case be pursued." J.A. 186, 189. The United States declined to intervene in the district court proceedings.[5] As the United States noted in its Court of Appeals brief, "none of the scientific or administrative bodies to which [Berge] complained found that Fowler had plagiarized Berge's work * * * and [NIH] concluded that her alleged false claims would not have influenced its funding decisions in this case." The United States also told the Fourth Circuit that the NIH "determined that the information Berge alleged was false or misrepresented was not material to its funding decisions." Brief for the United States 5, 34; *see also* J.A. 1509-13. Indeed, NIH continued to fund the grant in question at the time of trial (J.A. 445), almost five years after Berge first made her plagiarism charge and more than two years after she filed her complaint.

While the jury returned a verdict for Berge, the Fourth Circuit on appeal reversed in all respects. In particular, it found that there was insufficient evidence from which

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[5] While petitioner claims that this declination was based on a "*pro se* complaint," Pet. 8, it was in fact based on the government's own investigation after it received all of Berge's "evidence." J.A. 429-430, 179. Moreover, Berge's complaint was amended after she became represented by counsel. J.A. 10. Although the United States could have intervened at the trial level after it received the Amended Complaint (31 U.S.C. § 3730(c)(3)), it did not do so. In fact, the disinterest of the United States in Berge's claims, nominally brought for its benefit, is remarkable. In its brief before the Fourth Circuit to defend the constitutionality of the False Claims Act, the United States represented that "the Government takes no position on the merits of the appeal." Brief for the United States as Intervenor/Amicus 1.

a reasonable jury could find that the statements on which Berge based her False Claims Act suit were either false *or* material, and that Berge's pendent Alabama conversion claim was preempted by the Copyright Act.[6]

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S CLAIMS DID NOT REST ON ITS DETERMINATION THAT MATERIALITY IS AN ISSUE FOR THE COURT, AND THAT DETERMINATION IS IN ANY EVENT NOT WORTHY OF REVIEW

Petitioner claims that this Court should review the Fourth Circuit's conclusion that materiality in this civil action is an issue for the court rather than the jury. Pet. 21-24.[7] It is plain on the face of the Fourth Circuit's opinion, however, that the court's resolution of that question did not affect its decision in this case. This

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[6] Because of its disposition of the case, the Fourth Circuit declined to reach respondents' arguments that the district court erred in (1) failing to set aside a damages award that was flawed in a number of respects; (2) refusing to admit the OIG report concerning Berge's claims; (3) instructing the jury that intangible rights can be the subject of a conversion action under Alabama law and that loss of employment and mental anguish are compensable under Alabama conversion law; and (4) determining that there was legally sufficient proof of conversion. Pet. App. 10a n.1. Brief of Appellants 32-39; Reply Brief of Appellants 13-18. Even if the Court were to grant the petition and reverse the Fourth Circuit's judgment, therefore, the case would have to be remanded for the Fourth Circuit's consideration of these issues under federal and Alabama law.

[7] It is undisputed in this case that the False Claims Act imposes liability only for false statements that are material to the decisionmaker. *See* Pet. App. 10a; J.A. 754; *United States* v. *Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992); *Tyger Constr. Co.* v. *United States*, 28 Fed. Cl. 35, 55 (1993). In general, a false statement is considered to be material when it "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States*, 485 U.S. 759, 770 (1988); *see also United States v. Gaudin*, 515 U.S. 506, 509 (1995).

case is therefore a poor vehicle for resolving the second question presented by the petition. Even if the Court were inclined to overlook the posture in which this question comes to it, the issue is not worthy of review. Petitioner's reliance on this Court's decision in *United States* v. *Gaudin*, 515 U.S. 506 (1995) (materiality in a criminal trial is an issue for the jury), ignores the *Gaudin* Court's careful delineation of the scope of its decision and depends on a reading of the case that has not been endorsed by any court of appeals.

1. The Fourth Circuit's determination that the materiality of the alleged false statements should not have been submitted to the jury made no difference to the outcome of the case below. After reaching its conclusion that "the determination of materiality * * * is one for the court," Pet. App. 12a, the Fourth Circuit noted that "even the *Gaudin* Court acknowledged that there always remains as a threshold question of law whether the case for materiality is 'so weak that no reasonable juror could credit it.'" *Id.* (quoting *Gaudin*, 515 U.S. at 517). In these circumstances, the *Gaudin* Court stated, "even on our view of the matter the case should not have gone to the jury." *Gaudin*, 515 U.S. at 517. That is precisely the conclusion reached by the Fourth Circuit below. Regardless of whether materiality is ultimately a question for the court or the jury, the Fourth Circuit found, on the particular facts of this case, that the alleged false statements "are so lacking in materiality, indeed, are not even false, that no reasonable jury could have so found." Pet. App. 13a.

Thus, even if the Fourth Circuit had accepted petitioner's argument that materiality is an issue for the jury, it would have reversed the jury's determination due to the insufficiency of the evidence as to *both* materiality and falsity. This case, therefore, is a particularly poor vehicle for taking up the question whether materiality in civil actions under the False Claims Act is a question for

the court or a jury in cases—unlike this one—where that distinction might matter, *i.e.*, where the evidence would permit a reasonable jury to find the statements at issue material and false. It is the practice of this Court to deny certiorari where the resolution of the issue presented is "irrelevant to the ultimate outcome of the case." *Supreme Court Practice* at 173 (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964)). Here, the Fourth Circuit's resolution of the second question petitioner would present not only did not affect the ultimate outcome of this case but, as we explain next, is one with which the courts of appeals are in agreement.

2. The issue identified by petitioner, even if it had affected the outcome of the decision below, does not merit review under this Court's established guidelines for exercise of its discretionary certiorari jurisdiction. Petitioner complains that the Fourth Circuit improperly relied on this Court's decision in *Kungys* v. *United States*, 485 U.S. 759, 772 (1988) (holding in denaturalization case that "[it is proper to treat] the issue of materiality as a legal question") (citation omitted), and that it should have instead concluded that *Gaudin* effectively overruled *Kungys*. Pet. 21. Petitioner relies on the fact that *Gaudin* "explicitly repudiated" a decision—*Sinclair* v. *United States*, 279 U.S. 263 (1929)—on which *Kungys* had relied. Pet. 21-23.

What petitioner fails to account for, however, is that the *Gaudin* Court *declined* to overrule *Kungys* itself, despite its express recognition that *Kungys* "relied upon * * * our prior decision in *Sinclair*." *Gaudin*, 515 U.S. at 522. On the contrary, the Court noted that the decision in *Kungys* and the decisions in *Gaudin* and *Sinclair* arose in very different contexts. Observing that "the courts' power to resolve mixed-law-and-fact questions in civil cases [like *Kungys*] is not at issue here" and that "civil and criminal juries' required roles are obviously not identical," *id.* at 516-517, the Court had no difficulty concluding that a different result is possible in a civil

case because of the absence of the "constitutional ramifications" that are presented when the issue arises in the context of "an adjudication to which the Sixth Amendment right to jury trial attaches." *Id.* at 522. Thus, it is clear from the face of *Gaudin* that the Court there did not purport to determine its application in the civil context, but instead left undisturbed its earlier holding in *Kungys*.[8]

There is no compelling need for this Court to take up that issue now. The Fourth Circuit below did not question the application of *Gaudin* in the criminal context in which it was decided, and recognized that its contrary holding in a criminal case "can no longer stand as a result of" *Gaudin*. Pet. App. 11a. It also recognized, however, that this Court's decision in *Gaudin* resolved the issue only in the context of a criminal trial and took pains to note that the "constitutional ramifications" could well be different in the civil context. *Id.* The Fourth Circuit therefore held that "in the context of the civil False Claims Act the determination of materiality * * * is one for the court." *Id.* at 12a.

On that question, there is no conflict in the lower courts. Petitioner cites no decision of any federal court of appeals extending the holding of *Gaudin* to civil actions, and we are aware of none. On the contrary, those courts of appeals that have considered after *Gaudin* whether materiality in a civil action is a matter for the court or the jury have agreed with the Fourth Circuit's determination that the issue remains one for the court, as in *Kungys*. *See United States* v. *Stelmokas*, 100 F.3d 302, 316 (3d Cir. 1996) ("*Gaudin* did not affect the *Kungys* holding * * *. Quite the contrary is true because the *Gaudin* court discussed *Kungys* at length and made it clear that it was distinguishing *Kungys* because

[8] At most, even in petitioner's view, the *Gaudin* Court left the question unresolved in the civil context. *See* Pet. 21 ("materiality of false statements in civil cases is a question * * * [that] was expressly left open in [*Gaudin*]").

* * * *Gaudin* was concerned with a defendant's Sixth Amendment right to have a jury determine materiality in a criminal proceeding"), *cert. denied*, 117 S. Ct. 1847 (1997); *Hervey* v. *Estes*, 65 F.3d 784, 789 n.4 (9th Cir. 1995) ("*Gaudin* is not applicable to a civil proceeding").[9] There is, accordingly, no disagreement in the courts of appeals concerning application of *Gaudin* in the civil context. Only three circuits have opined on the question, and each has reached the same conclusion: that *Gaudin* does not apply to civil proceedings. There is no "compelling reason" for this Court to intervene at this time to review the unanimous judgment of those few courts of appeals that have had occasion to consider the implications for civil actions of this Court's relatively recent decision in *Gaudin*.

3. In all events, the Fourth Circuit's decision is correct under current law. Where materiality is in issue in civil matters brought "under * * * statutes dealing with misrepresentations to public officers," *Kungys*, 485 U.S. at 772, this Court has directed that the issue is to be decided by the court as a matter of law. *Id.* The materiality of a false statement to the government is a threshold question, a "judicially-imposed limitation to insure the reasonable application of the statute." *United States* v. *Abadi*, 706 F.2d 178, 180 n.2 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983) (quoted with approval in *Kungys*, 485 U.S. at 772). Especially where it involves consideration, in light of statutory and regulatory provisions, of the effect that undisputed statements could have on government action, the determination of materiality is primarily a legal rather than a factual inquiry. In this context, it involves consideration not of what a reasonable person would have done or the actual effect of al-

[9] The application of the holding of *Kungys* to the particular context of civil False Claims Act cases has been endorsed by the only other court to consider the question. *United States ex rel. Butler* v. *Hughes Helicopter Co.*, No. CV-89-5760-SVW, 1993 WL 841192, at *15 (C.D. Cal. Aug. 25, 1993), *aff'd on other grounds*, 71 F.3d 321 (9th Cir. 1995).

legedly false statements—prototypical jury questions [10]—but rather consideration of what *legal* alternatives, if any, would be available to the government, and determination of the natural tendency of a statement to influence government action.

Accordingly, nearly all courts that considered the issue prior to 1995 had determined in the context of both civil *and* criminal cases under the False Claims Act that materiality is a question for the court, *see, e.g., United States* v. *Norris*, 749 F.2d 1116, 1122 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985), and the Court endorsed that rule in *Kungys*. As noted, application of the settled rule of *Kungys* to civil cases is not undermined by *Gaudin*. The holding of *Gaudin* rests explicitly on the constitutional rights of the criminal defendant to have a jury determination of all elements of a crime. Because of the criminal context, the Court expressly declined to accept the government's argument that materiality—even if a question of law—is necessarily for the court, reasoning instead that the Constitution requires judgments about all elements of a crime, whether legal or factual, to be submitted to the jury. *See* 515 U.S. at 514 (jury is not "mere factfinder" in criminal case). The Court also expressly declined to overrule its decision in *Kungys*, leaving undisturbed the settled rule that in the civil context, the issue of materiality is for the court. Thus, the Fourth Circuit's decision in this case was a faithful application of existing law on which the lower courts are in agreement. In all events, for the reasons explained above, the issue on which it opined did not affect the outcome of the decision below and does not warrant review by this Court.

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[10] *See TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976) (materiality of omission from proxy statement is a jury question because it involves judgments about how a reasonable shareholder would react).

II. THERE ARE NO COMPELLING REASONS TO REVIEW THE COURT OF APPEALS' ASSESSMENT OF THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE

In reversing the judgment in favor of petitioner, the Fourth Circuit determined that its "*de novo* review * * * of the alleged false statements plainly shows that they were not material to [NIH]'s funding decisions, and furthermore are so lacking in materiality, indeed, are not even false, that no reasonable jury could have so found." Pet. App. 12a-13a. "[I]t is," the court held, "abundantly clear that substantial evidence upon which the jury could have found for Berge is lacking." *Id.* at 17a.

The Fourth Circuit's decision is therefore simply a decision about the sufficiency of the evidence in this case. Its discussion of the evidence recounts no consideration of any disputed legal issues, rejects no argument of Berge's except her claim that the evidence was sufficient to sustain the verdict, and does not purport to part company with any other court of appeals on any issue. Berge's complaints about the court of appeals' determination that the evidence was insufficient to permit a reasonable jury to find either falsity or materiality therefore present no issue of significance outside of this case, and there are no "compelling reasons" for this Court to exercise its certiorari jurisdiction. Sup. Ct. R. 10. *See also id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

Apparently recognizing that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925),[11]

[11] As four members of this Court recently noted, "[t]hat policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court." *Kyles* v. *Whitley*, 514 U.S. 419, 456 (1995) (citing *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981) (in "run-of-the-mine case in which an appellate court * * * reached an opposite conclusion

Berge goes to great lengths in her petition to attempt to find a certworthy legal issue in the court of appeals' conclusions about the sufficiency of the evidence. That effort fails. The intercircuit "conflict" that Berge purports to identify—concerning the evidence that a court of appeals should review in determining the sufficiency of the evidence to support a judgment—not only does not exist, but also involves an argument that was not presented to the court of appeals; the court of appeals in any event applied the correct and well-settled standard of review when it considered this case. Rather than an "ideal vehicle" for resolving a purported "circuit controversy," Pet. 19, this case is a poor candidate for certiorari because petitioner would have this Court review only an application of well-settled law that was not challenged by her below.

1. Berge's petition fails at the threshold because she never identified to the court of appeals the purported legal issue she would now present to this Court or asked the court of appeals to apply any standard other than the one it applied. In her court of appeals brief, Berge simply stated that the correct standard of review was found in the Fourth Circuit's earlier decision in *Duke* v. *Uniroyal, Inc.*, 928 F.2d 1413, 1417 (4th Cir.), *cert. denied*, 502 U.S. 963 (1991): "When determining whether the evidence is sufficient to support the jury's verdict, the evidence must be reviewed in the light most favorable to plaintiffs, giving them the benefit of all inferences." *See* Brief of Appellee 22. She did not urge, as she now does, that the Fourth Circuit's cases had applied an incorrect standard, and that it would be erroneous for the court to review "all the evidence" in determining whether it was sufficient to sustain the jury's verdict. In fact, her discussion of the evidence included arguments grounded in the testimony of, or exhibits offered by, the respondents (*see, e.g., id.* at

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from a trial court * * * there [is] little reason for invocation of this Court's discretionary jurisdiction to make a third set of findings")).

24)—evidence she now claims the court of appeals should not have considered.[12]

It is, of course, this Court's practice to decline to decide questions not presented to or considered by the court of appeals. *See, e.g., FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990); *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Petitioner's failure to alert the Fourth Circuit to what she now claims is a longstanding and well-developed conflict on the correct standard of review ought to preclude her from raising it here.

Nor can it be said that the court of appeals "passed upon" the question petitioner now presents in such a way as to permit this Court to overlook her failure to present it below. Presumably because the parties were in agreement on the correct standard of review, the Fourth Circuit nowhere claimed to have considered the purported circuit conflict and sided with one of the allegedly competing views. It simply noted that its review of the denial of a motion for judgment of a matter of law is *de novo*, cited a case articulating the same standard urged by the parties,[13] and proceeded to review the evidence that had been presented below.

Petitioner apparently seizes on one sentence of the Fourth Circuit's opinion for her claim that the Fourth Circuit "passed upon" the question she failed to present. *See* Pet. App. 17a ("Reviewing all *this* evidence in the light most favorable to Berge * * *") (emphasis added). That sentence, however, pointedly does *not* constitute, as petitioner claims, a holding by the Fourth Circuit that it "may review *all* of the evidence." Pet. 15 (emphasis in

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[12] Respondents' brief in the court of appeals articulated the same standard. *See* Brief of Appellants 3. As the case was presented to the Fourth Circuit, therefore, the parties were in agreement as to the applicable standard of review.

[13] *See* Pet. App. 12a, 17a, citing *Benedi* v. *McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995).

original). It does not establish, as petitioner would have it, that the Fourth Circuit believes it is entitled to credit evidence favorable to the movant "even if it was controverted, impeached or offered by an interested witness." Pet. i. And it certainly does not establish that the Fourth Circuit "passed upon" the question—of which, from all that appears, it was unaware—of whether its longstanding standard of appellate review should be reconsidered in light of the purportedly different holdings of other circuits.

In short, the panel of the court of appeals that heard this case below would be quite surprised to read what the petition says this case is about, because the first question presented in the petition involves an issue that was neither pressed nor passed upon below. For this reason alone, the Court should decline to consider it now.

2. The intercircuit "conflict" identified by petitioner is largely of her own creation, and rests on semantic distinctions that do not affect the outcome of cases in the courts of appeals. Even petitioner admits that ten of the federal circuit courts, in reviewing denials of judgment as a matter of law, review all of the evidence and view that evidence in the light most favorable to the verdict winner. *See* Pet. 15 n.2. Significant to the question of whether those courts are in conflict with the other federal circuit courts of appeals, *not one* of the cases cited by petitioner in footnote 2 of her petition contains any discussion of the issue on which petitioner believes there is a raging controversy in the circuits. These cases merely mention in passing that the court is reviewing "all the evidence" in considering whether a motion for judgment as a matter of law should have been granted.

Many other decisions, including opinions from every circuit, leave the word "all" out of their formulation of the standard of review.[14] While petitioner sees in this

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[14] *See, e.g., Ealy* v. *Richardson-Merrell, Inc.*, 897 F.2d 1159, 1161 (D.C. Cir.), *cert. denied*, 498 U.S. 950 (1990); *Bogosian* v.

formulation some uncertainty about whether these courts review "all of the evidence or only some subset," Pet. 16, we think it plain that these courts do what they say—review "the evidence," not just "some of" the evidence. These decisions too contain no discussion of any ongoing legal controversy concerning what evidence should be reviewed on appeal.

Like the Fourth Circuit below, all of these courts are apparently unaware that their ordinary formulation of the appropriate standard of review, whether or not it specifies in each instance that the court is in fact reviewing "all the evidence," is at odds with the views of other circuits. The reason for this is plain: there is no conflict among the circuits. Petitioner submits that the Sixth and Eighth Circuits squarely reject the view that they may review "all the evidence" (or "the evidence") in the light most favorable to the party that prevailed before the jury. Pet. 15-16. Not so. As petitioner candidly admits, Pet. 16 n.6, cases from both circuits establish that those courts too review "all the evidence" in determining whether a motion for judgment as a matter of law is warranted. *See Curtis* v. *Electronics & Space Corp.*, 113 F.3d 1498, 1502 (8th Cir. 1997) ("*All evidence* is viewed in the light most favorable to the verdict") (emphasis added); *Cook* v.

Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 475-476 (1st Cir. 1997); *Simms* v. *Village of Albion*, 115 F.3d 1098, 1110 (2d Cir. 1997); *Villaneuva* v. *Brown*, 103 F.3d 1128, 1133 (3d Cir. 1997); *Redman* v. *John D. Brush & Co.*, 111 F.3d 1174, 1179 (4th Cir. 1997); *Melton* v. *Teachers Ins. & Annuity Ass'n*, 114 F.3d 557, 559 (5th Cir. 1997); *American & Foreign Ins. Co.* v. *Bolt*, 106 F.3d 155, 157 (6th Cir. 1997); *Emmel* v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996); *Penney* v. *Praxair, Inc.*, 116 F.3d 330, 334 (8th Cir. 1997); *Amarel* v. *Connell*, 102 F.3d 1494, 1517 (9th Cir. 1997); *Doan* v. *Seagate Technology, Inc.*, 82 F.3d 974, 976 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); *Colvin* v. *Housing Auth. of City of Sarasota, Florida*, 71 F.3d 864, 866 (11th Cir. 1996); *Eastman Kodak Co.* v. *Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1559 (Fed. Cir. 1997).

American S.S. Co., 53 F.3d 733, 740 (6th Cir. 1995) ("we view *all the evidence* in the light most favorable to the nonmoving party") (emphasis added).[15]

The two cases cited by petitioner, moreover, are not stray eddies outside the current of these circuits' rulings; rather, they are squarely in the mainstream. Time and again, both the Sixth and the Eighth Circuits have applied the standard applied by every other circuit in reviewing claims for judgment as a matter of law.[16] While these two courts—like the other circuits—do not always recite that they review "all the evidence" but sometimes simply refer to "the evidence," their decisions display no disagreement with the approach of the other circuits and apply the same standard that is applied in every circuit.

Petitioner's contention that the circuits are in conflict, therefore, is simply wrong. From all that appears in countless opinions of the court of appeals, there is no disagreement about the standard to be applied in reviewing denials of motions for judgment as a matter of law.

3. In her attempt to identify a conflict, petitioner relies on authorities that simply do not support her contention. In particular, petitioner's claims that the Sixth

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[15] *See also Hill* v. *Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (viewing "*the admissible evidence* most favorable to the party opposing the motion") (emphasis added).

[16] *See, e.g., K & T Enters., Inc.* v. *Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996) ("*the evidence* should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences") (emphasis added); *Black* v. *Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir. 1997) (same), *pet. for cert. filed*, 66 U.S.L.W. 3109 (U.S. July 24, 1997) (No. 97-159); *O'Brien* v. *City of Grand Rapids*, 23 F.3d 990, 995 (6th Cir. 1994) (same); *Sherbert* v. *Alcan Alum. Corp.*, 66 F.3d 965, 967 (8th Cir. 1995) (same); *Smith* v. *World Ins. Co.*, 38 F.3d 1456, 1460 (8th Cir. 1994) (same); *Bierle* v. *Liberty Mut. Ins. Co.*, 992 F.2d 873, 875-876 n.7 (8th Cir. 1993) (same).

Circuit applies a different standard of review are not grounded in relevant authority. Petitioner cites *Smelser* v. *Norfolk S. Ry.*, 105 F.3d 299, 306 (6th Cir. 1997), *pet. for cert. filed*, 65 U.S.L.W. 3827 (U.S. June 4, 1997) (No. 96-1949),[17] and *Aparicio* v. *Norfolk & W. Ry.*, 84 F.3d 803, 807 (6th Cir. 1996), for her claim that the Sixth Circuit—apparently in these two cases only—has parted company with the other circuits and adopted a more limited form of review.[18] These cases arose under the Federal Employers' Liability Act ("FELA"), and in each case the Sixth Circuit stated its understanding that "[a] different standard [of review] applies in [FELA] cases." *Aparicio*, 84 F.3d at 807. *See also Smelser*, 105 F.3d at 306 ("In FELA cases, however, a different standard [of review] applies"). Thus, to the extent these cases said anything about the standard of review to be applied in non-FELA cases, their views were *obiter dicta*.

In addition, while both panels of the Sixth Circuit did state that a court "looks only to the plaintiff's evidence to make its determination," *Aparicio*, 84 F.3d at 807; *Smelser*, 105 F.3d at 306 (quoting *Aparicio*), the critical fact common to both cases was that they discussed the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50(a) *at the close of plaintiff's case*. Thus,

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[17] The petition in *Smelser* does not present the question that petitioner presents here, and does not claim that the Sixth Circuit's opinion is in conflict with any other circuit on that question.

[18] Not surprisingly given that the purportedly different standard has been created by petitioner herself, the petition is unclear about what she believes that minority view to be. Petitioner first claims that this position excludes consideration "of the movant's evidence" and should consider only the "non-movant's evidence," Pet. 13, 14, by which Berge presumably means that evidence introduced by the non-movant. Later, however, this standard is described as permitting the court to look not just at evidence *introduced* by the non-movant (*i.e.*, "the non-movant's evidence"), but rather at all evidence "favoring the non-movant," apparently without regard to which party introduced the evidence. Pet. 15.

as *Aparicio* expressly noted, the issue arose where "the defendant has not yet presented any proof." 84 F.3d at 807. *See also Smelser*, 105 F.3d at 306 (reviewing trial court's denial of defendant's motion for judgment "at the close of [plaintiff's] case"). In such circumstances, it is hardly surprising that the courts "look[] only to the plaintiff's evidence to make [their] determination," for *no other evidence has been offered.* These cases present no conflict with the usual rule applied in every circuit.

Nor do the Eighth Circuit cases on which Berge relies present any occasion for this Court to exercise its certiorari jurisdiction in this case. To be sure, both of these cases, along with several other Eighth Circuit decisions relying on them,[19] do state that "[g]enerally, only evidence favoring the non-moving party should be considered." *Caudill* v. *Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990); *Dace* v. *ACF Indus, Inc.*, 722 F.2d 374, 376 (8th Cir. 1983), *as supplemented on rehearing*, 728 F.2d 976 (8th Cir. 1984) (per curiam). Even if these cases were viewed as stating a different (minority) view of the appropriate standard of review, however, they do not even constitute the settled view of the Eighth Circuit. As noted, cases from that court have repeatedly articulated that it is appropriate to review "all the evidence" or "the evidence" without indicating any intent to exclude certain evidence from consideration. At the very most, then, petitioner has identified a tension in approaches by different panels of the Eighth Circuit. It has long been settled that " 'decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.' " *Supreme Court Practice* at 176 (quoting Justice Harlan, *Manning*

[19] *McAnally* v. *Gildersleeve*, 16 F.3d 1493, 1496 (8th Cir. 1994); *Kientzy* v. *McDonnell Douglas Corp.*, 990 F.2d 1051, 1056 (8th Cir. 1993); *Butler* v. *Dowd*, 979 F.2d 661, 675 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993).

the Dikes, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)). *See also Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

Petitioner's reliance on Justice White's dissent from denial of certiorari in *Schwimmer* v. *Sony Corp.*, 459 U.S. 1007 (1982), fails to recognize that "comments in [a] dissenting opinion * * * are just that: comments in a dissenting opinion." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980). No other Justice joined in that dissent, which articulated two perceived conflicts in the circuits. As to the "conflict" purportedly at issue here, Justice White believed that the First and Third Circuits followed what the petitioner calls the "middle ground" and attributes to the Eighth Circuit. *See* 459 U.S. at 1009; Pet. 16. As petitioner recognizes, however, even if those courts at one time followed a "middle ground," more recent decisions of those circuits repeat the standard formulation used by the other circuits.[20] Justice White attributed to the Eighth Circuit an approach under which "only evidence which supports the verdict winner is to be considered." 459 U.S. at 1009. But, as noted above, most panels of that court now articulate the standard formulation. Any intercircuit "conflict" that existed at the time of Justice White's 1982 dissent from denial—a conflict the other members of the Court found tolerable or non-existent—has only narrowed in the intervening 15 years and is now at most an intracircuit tension. There is even less reason to take up the issue now than there was in 1982.

4. Examination of the verbal formulations employed by the courts, including the Eighth Circuit, would be

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[20] *See* Pet. 15 n.2 (*citing Dragon* v. *Rhode Island Dep't of Mental Health, Retardation & Hosps.*, 936 F.2d 32, 36 (1st Cir. 1991) (Breyer, J.) and *Walter* v. *Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993)); Pet. 16 n.7 (*citing Katz* v. *City Metal Co.*, 87 F.3d 26, 28 (1st Cir. 1996) and *McDaniels* v. *Flick*, 59 F.3d 446, 453 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1017 (1996)).

largely an academic exercise in semantics. In all circuits, the settled rule is that evidence is reviewed in the light most favorable to the verdict winner, with all reasonable inferences drawn in that party's favor. *See* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 at 255-259 (2d ed. 1995). This rule has been regularly applied by those panels of the courts of appeals that employ the "all the evidence" formulation; they too "view all the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party."[21] Where there is an evidentiary dispute, therefore, the courts are in full agreement that the applicable standard of review requires them to credit the evidence favoring the non-movant. Thus, in these circumstances, the appropriate and universal standard of review commands that—in the words of the Eighth Circuit—"only evidence favoring the non-moving party should be considered." *Caudill*, 919 F.2d at 86. There is, in short, little other than a linguistic distinction between the courts that *consider* all the evidence but *rely* only on that which favors the non-moving party and the Eighth Circuit's occasional articulation that only the evidence favoring the non-moving party should be considered.[22]

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[21] *Harris* v. *Chapman*, 97 F.3d 499, 505 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997). *See also Central Office Tel., Inc.* v. *AT&T*, 108 F.3d 981, 992 (9th Cir. 1997); *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3108 (U.S. July 21, 1997) (No. 97-126); *Lester* v. *RTC*, 994 F.2d 1247, 1253 (7th Cir. 1993); *Walter* v. *Holiday Inns, Inc.*, 985 F.2d at 1238.

[22] The only circumstance in which the purported distinction might be thought to be relevant is where uncontradicted evidence favors the moving party. But, as petitioner notes, even those panels of the Eighth Circuit on which petitioner relies recognize that uncontradicted evidence favoring the movant may be considered. *See* Pet. 16 (*citing Caudill*, 919 F.2d at 86, and *Dace*, 722 F.2d at 377 n.6). Thus, even as to this narrow range of evidence, the Eighth Circuit's own internal differences in articulation of the standard do not affect the actual substance of review.

In her search for a conflict, petitioner has seized on the fact that the settled standards for reviewing sufficiency of the evidence have "been the subject of a great variety of verbal formulations." Wright & Miller, *supra*, § 2524 at 261. In the real world, however, the variety of verbal formulations makes little if any difference in the outcome of cases because all courts effectively review the same evidence in determining whether a motion for judgment as a matter of law should have been granted. There is no warrant for this Court to grant the petition so that it can impose a verbal straightjacket on the opinions of the courts of appeals, and there is even less reason to review the Fourth Circuit's conclusion on the sufficiency of the evidence in this particular case.

III. THE COURT OF APPEALS APPLIED SETTLED LAW TO THE FACTS OF THIS CASE IN DETERMINING THAT PETITIONER'S STATE-LAW CONVERSION COUNT WAS PREEMPTED

Berge's state-law conversion claim is based on allegations that respondents "included Dr. Fowler's plagiarized abstract in the Year 14 progress report" and that Dr. Pass and Dr. Fowler "published their 1991 article in the *Journal of Infectious Diseases*," Pet. 24, an article which she claims "pervasively used" her work. Brief of Appellee 49-50. In considering this claim, the Fourth Circuit accepted for purposes of argument Berge's disputed contention that "ideas and information" are subject to conversion under Alabama law. Applying settled federal preemption analysis, the court held that "[t]here can be no doubt that Berge's work—her dissertation, to which she herself affixed a copyright mark; her abstracts; her drafts, etc.—falls within the scope of the subject matter of copyright." Pet. App. 19a. Although "ideas and methods" are excluded from copyright protection, the court noted, "the shadow actually cast by the Act's preemption is notably broader than the wing of its protection." *Id.*

The court then considered whether Alabama conversion law contained "an 'extra element' that changes the nature of the state law action so that it is '*qualitatively* different from a copyright infringement claim.' " *Id.* (*quoting Rosciszewski* v. *Arete Assocs., Inc.*, 1 F.3d 225, 229 (4th Cir. 1993) (emphasis in *Rosciszewski*). Thus, the court recognized, a state law action for conversion is not preempted if it involves proof that the defendant "unlawfully retained the physical object embodying plaintiff's work," but is preempted if the plaintiff alleges only "unlawful retention of its intellectual property rights and not * * * of the tangible object embodying its work." Pet. App. 19a-20a (internal quotation marks and citations omitted). Under this "hornbook law," Pet. App. 19a, the Fourth Circuit held, "[i]t could hardly be clearer that Berge's conversion claim is preempted." *Id.* at 20a. The court found it "crucial" that petitioner made "no claim that appellants converted any tangible objects embodying her intellectual property." *Id.* Thus, the court held, her "charge of plagiarism and lack of attribution * * * are tantamount to * * * a claim of copyright infringement, for Berge has certainly not been prevented from using her own ideas and methods." *Id.* at 22a.

Petitioner cites no court that rejects the Fourth Circuit's mode of analysis; she does not and cannot dispute that the courts of appeals have unanimously adopted the "extra element" test for determining whether a state law seeks to protect "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106." 17 U.S.C. § 301(a).[23] Rather, petitioner argues that the Fourth Circuit erred in its *application* of that test to the facts of this

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[23] *See National Basketball Ass'n* v. *Motorola, Inc.*, 105 F.3d 841, 850 (2d Cir. 1997) ("certain forms of commercial misappropriation otherwise within the general scope requirement will survive preemption if an 'extra-element' test is met"); *Harolds Stores, Inc.* v. *Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1543 (10th Cir.), *cert.*

case. *See* Pet. 24 (Court should resolve purported dispute "over how to apply the explicit preemption provisions of the Copyright Act to state law claims of conversion of intellectual property"). As noted, however, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. There is no compelling reason to review the Fourth Circuit's application of settled law to Berge's claim.

Petitioner attempts to identify a "conflict" by citing *G.S. Rasmussen & Assocs.* v. *Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992), *cert. denied*, 508 U.S. 959 (1993). While petitioner would find in that case adoption of a different "approach," Pet. 24, the Ninth Circuit's opinion evidences nothing more than application of the settled test to the particular facts of the case before it. The *Kalitta* court, quoting earlier Ninth Circuit authority, recognized that section 301(a) "preempts a state-created right if that right may be abridged by an act which, in and of itself, would infringe one of the exclusive rights listed in § 106. But if violation of the state right is predicated upon an act incorporating elements beyond mere reproduction or the like, there is no preemption." *Id.* at

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denied, 117 S. Ct. 297 (1996) (same); *Bateman* v. *Mnemonics, Inc.*, 79 F.3d 1532, 1549 (11th Cir. 1996) (applying "the 'extra element' test generally employed by courts in performing copyright preemption analysis"); *Daboub* v. *Gibbons*, 42 F.3d 285, 289-290 (5th Cir. 1995) (state law preempted where it does not require proof of extra element); *Data Gen. Corp.* v. *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1157 (1st Cir. 1994); *Anderson* v. *Nidorf*, 26 F.3d 100, 102-103 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995); *Kregos* v. *Associated Press*, 3 F.3d 656, 665-666 (2d Cir. 1993) (state law preempted where it does not require proof of extra element), *cert. denied*, 510 U.S. 1112 (1994); *Rosciszewski*, 1 F.3d at 229-230 (same); *National Car Rental Sys., Inc.* v. *Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 431 (8th Cir.), *cert. denied*, 510 U.S. 861 (1993). *See also* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[B][1], at 1-15 to 1-16 (1997); III Paul Goldstein, *Copyright*, § 15.2.1.2, at 15:10 to 15:14 (2d ed. 1996).

904 (quoting *Oddo* v. *Ries*, 743 F.2d 630, 635 (9th Cir. 1984) (internal quotations, bracket and citations omitted)). That, of course, is the extra element test applied by the Fourth Circuit below. The Ninth Circuit then applied that settled test to the particular facts before it—involving use of an unauthorized copy of a certificate issued by the FAA—and held that the state law claim there at issue was not preempted.

The Fourth Circuit did not reject *Kalitta*, but instead recognized and applied the Fifth Circuit's distinction of the facts of that case in *Daboub* v. *Gibbons*, *supra*. *See* Pet. App. 21a-22a. The *Daboub* court observed that the plaintiff in *Kalitta* "was not simply complaining about the improper copying of the copyrighted material." 42 F.3d at 289. In the case before it, by contrast, the Fifth Circuit held that state law claims were preempted because "[t]he core of each of these state law theories of recovery * * * [is] the wrongful copying, distribution, and performance of the lyrics" of the song at issue. *Id.* So too here: "Berge's charge of plagiarism and lack of attribution can only amount to, indeed, are tantamount to, a claim of copyright infringement, for Berge has not been prevented from using her own ideas and methods." Pet. App. 22a.

The Ninth Circuit both before and since *Kalitta* has affirmed that it too follows the generally accepted test. *See Anderson* v. *Nidorf*, 26 F.3d at 102; *Oddo* v. *Ries*, 743 F.2d at 635. To the extent that *Kalitta* is perceived to employ a less preemptive application of that test, its effect is, to date, limited to that case alone; no other court has applied *Kalitta* so that state law conversion claims survive where the gravamen of those claims is wrongful copying or distribution.[24] And, if it is so understood,

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[24] *See, e.g., Daboub*, 42 F.3d at 289-290; *Taquino* v. *Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990); *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

Kalitta has been rejected by the commentators.[25] Thus, at most, petitioner has identified a possible tension between the decision below, which follows the general approach, and a single, arguably incorrect decision of the Ninth Circuit. This tension—if it exists at all—is surely tolerable unless and until the perceived conflict is expanded and developed.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[25] *See* 1 *Nimmer on Copyright* § 1.01[B][1][i] at 1-38 ("If * * * contrary to the usual view of conversion, it is regarded as encompassing unauthorized reproductions, then the rights created are indeed 'equivalent' to copyright, and the state law is preempted. For this reason, it may be questioned whether [*Kalitta*] ruled correctly that defendant's use of intangibles constituted conversion under state law, immune from copyright protection"); *see also id.* at 1-38 to 1-39 n.181.3.